Waterway and Wetland Handbook
CHAPTER 60
BULKHEAD LINES, LEASES AND LAKEBED GRANTS

GUIDANCE PURPOSE AND DISCLAIMER

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Authorizing the adoption of bulkhead lines and bulkhead line/lease combinations.

PURPOSE

A bulkhead line is a legally established shoreline, adopted by a municipal ordinance and approved by the Department. The main purpose of a bulkhead line should be to regularize the shoreline. A secondary purpose of a bulkhead line is to establish a recoverable shoreline, which can be resurveyed at a later date.

Section 24.39(4), Wis. Stats., in conjunction with s. 30.11, Wis. Stats., grants authority to the board of commissioners of public lands to lease "rights to the beds of lakes and rights to fill in beds of lakes or navigable streams" to individual riparians and municipalities. These leases may be granted to riparians for the purpose of improving navigation and for the improvement or construction of harbor facilities. A lease may also be granted to municipalities, where the municipality is the riparian owner, for the purpose of improving or providing recreational facilities related to navigation for public use.

Since bulkhead line/lease combinations need not conform closely to the existing shoreline, large tracts of lakebed or state controlled streambeds may be leased to riparians for navigation or harbor related improvements, where a bulkhead line alone would not be acceptable.

MECHANISM

A bulkhead line is issued under s. 30.11, Wis. Stats. Only a municipality may apply for a bulkhead line. The municipality submits six copies of a proposed ordinance with a surveyed description of the proposed bulkhead line and six copies of the accompanying map. If the ordinance and map meet statutory standards, the Department approves the map and ordinance. Once the approved ordinance and maps are filed in accordance with the statute, the bulkhead line becomes legally established.

A bulkhead line/lease is approved under ss. 24.39 and 30.11, Wis. Stats. The bulkhead line/lease procedure is the same as for an ordinary bulkhead line, except that 1) shoreline conformance standards are eliminated; 2) once the bulkhead line is approved, the submerged lands lease is voted upon by the board of commissioners of public land; and 3) the commissioners will only act after the Department has found that the bulkhead line/lease is consistent with the public interest in the affected waters, as outlined under s. 30.11(5), Wis. Stats.

HISTORY

The historical roots of bulkhead lines may be traced back as far as the Northwest Ordinance of 1787. This document provided that the territory including Wisconsin would be ceded to the United States, but that the navigable waters within the territory must remain forever free for navigation. This and related provisions have come to be known as the Trust Doctrine, whereby the state merely holds the navigable water in trust for all the people of Wisconsin, and may not relinquish these waters to private interests (see Handbook Chapter 30 for further history of this concept).

Wisconsin owns the bed of all natural navigable lakes as a direct result of admission to the union in 1848. The beds of natural lakes are held in trust for the people, and this land cannot be sold or given away to private interests except under special conditions. The history of bulkhead lines and leases is mainly a recounting of the changing standards which have been applied to determine under what conditions the sale or lease of state owned submerged land would be allowed.

One of the earliest examples of a state effort to grant lakebed occurred in 1854. Chapter 276 of the private and local laws of 1854 authorized L. M. Parsons and others to drain Rush Lake in Winnebago County. The act granted this group title to the bed of Rusk Lake, provided they drained the lake within three years. No compensation was received by the state in exchange for the grant of the bed. Apparently the legislature felt that the public would be benefited by the draining of the lake and surrounding marshland. The project was never completed, and the act was repealed in 1856.

In the early 1890's, the Wisconsin Land and Improvement Company conceived a plan to drain Big Muskego Lake in Waukesha County by digging an artificial ditch from the lake to the Fox River. Once the lake was drained, the exposed bed would be sold to farmers for agricultural use by the company.

The Wisconsin Legislature had approved this plan by passing legislation granting the bed of this lake to the company. Priewe, a local citizen, filed suit in an effort to prevent the destruction of the lake. The Wisconsin Supreme Court in Priewe vs. Wisconsin State Land and Improvement Company, 103 Wis. 537 (1899), stated:

> The Legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose.

In 1902, the Supreme Court decided Rossmiller v. State, (114 Wis. 169). This case involved the right of the state to regulate ice cutting. The Court declared, in dicta, that the state could not sell lakebed for revenue purposes under any circumstances. Taken literally, this interpretation prohibited dredging or mining of state-owned lakebeds. Although the state was prohibited from selling lakebed at this time, filling of waterways was common, and was regulated by local authority.

The right of local government to regulate and control structures and establish "docklines" was established long before the state adopted regulatory controls. One example is Chapter 134, private and local laws of 1856, which granted the City of La Crosse, in its incorporation charter, the power "to regulate the construction of piers, docks, wharves and levees extending into the Mississippi River." These "docklines" were sometimes used to authorize

filling of lakes and streams. For example, the case Walker vs. Shepardson, 4 Wis. 486 (1855), upheld the right of a riparian to fill in a significant amount of the Milwaukee River in front of his lots but behind an established dockline in order to create a suitable wharf facility for his business.

The early regulation of piers, wharves and docks by local ordinance is discussed at length in Handbook chapters 70 and 75 covering structures and piers respectively. It is clear that filling of waterways was fairly common before the legislature and the courts began to restrict the practice of strengthening regulations covering bulkhead line approval.

In Chapter 335, Laws of 1917, the Legislature passed s. 30.02, Wis. Stats., which said that municipalities (excluding certain counties) may "by ordinance, resolution or bylaw establish, and from time to time may change and reestablish, dock or wharf lines upon existing navigable waters, or upon such waters thereafter to be created, within their respective boundaries." In 1919 Chapter 247 added the language: "All such lines shall conform as nearly as practicable to the original meander lines and surveys of such waters." These wharf or dock lines later came to be known as bulkhead lines and were effectively an artificial shoreline.

The Legislature also passed Chapter 454, Section 45, Laws of 1917, a statute covering leasing of state-owned property. This statute permitted the commissioners of public lands to lease portions of state owned lands other than parks and forest land to private individuals, mainly for the sale of damaged timber. Additionally, the commissioners could grant licenses for mineral prospecting on state-owned lands. State parks and forests were leased by the conservation commission. It was not until 1961 that the commissioners of public lands were given the right to lease state-owned lakebed.

Interestingly enough, the Legislature granted a portion of the bed of Lake Michigan to the Simmons Company in Chapter 230, Laws of 1919, for $500. No specific purpose was listed in this grant, which was completely illegal according to the Supreme Court interpretation of the legality of lakebed grants then in effect. Apparently, the Legislature was either unaware of the law, or chose to ignore it.

In 1927, the Wisconsin Supreme Court was again called upon to decide the validity of a legislative lakebed grant. The proposal involved transferring part of the bed of Lake Michigan to the City of Milwaukee, which would then fill in the area and transfer the land to a private industrial corporation. In exchange, the corporation would transfer valuable harbor property it owned to the City of Milwaukee for port development.

The Supreme Court sustained the grant in City of Milwaukee v. State, 193 Wis. 423 (1927), on the grounds that there would be little impact on navigation, the size of the area granted was relatively small in relationship to Lake Michigan, and the project was in the public interest. The transfer of land to the private corporation was held to be merely incidental to the overall public purpose of the project, hence legal. The court further found that the land granted to the corporation would protect the harbor and "will therefore be an aid to public navigation."

In 1928, the Wisconsin Supreme Court decided Angelo v. Railroad Commission, 194 Wis. 543, a case involving the right of the Wisconsin Railroad Commission to allow the removal of marl from the bed of a lake. The Court determined that the state had the right to enter into contracts for the sale of lakebed material, provided adequate compensation was received. Apparently, the Court felt that the state had many of the property rights normally associated with ownership of land, including the right to sell lakebed. According to this case, the Trust Doctrine mainly applied to the navigable water, not the bed itself. This case provided the framework allowing the leasing of lakebed which later became common.

The Legislature rewrote s. 30.02, Wis. Stats., by Chapter 455 of the Laws of 1933, to allow municipalities (except counties and cities larger than 300,000 persons) to establish both shore and pier lines (later known as bulkhead and pierhead lines), provided the lines were established in the public interest. In addition, "shore lines shall conform as nearly as practicable to existing shores." (changed from meander lines.) These lines were

subject to the approval and filing requirements of the Public Service Commission. This provision allowed the regularization of existing shorelines, and survives essentially unchanged today in s. 30.11, Wis. Stats. This chapter also prohibited placing any structure beyond an established shoreline other than a pier allowing the free movement of water underneath.

While the Legislature was allowing most municipalities the right to allow filling behind shorelines, the Wisconsin Supreme Court was clarifying the legislative right to make grants of lakebed. In 1957, the Court decided State v. Public Service Commission, 275 Wis. 112. In this case, the Court allowed the City of Madison to fill in 1-1/4% of Lake Wingra, a 320 acre navigable lake located within city boundaries, for park purposes not related to navigation improvement. The Supreme Court upheld the grant on the grounds that:

1. The land would be publicly controlled

2. The area would be used for public purposes and open to the public

3. The fill was small compared to the total lake area

4. No public lake uses would be destroyed

5. The project would afford the public more benefits than it would destroy.

Chapter 441, Laws of 1959, further clarified the treatment of bulkhead lines, and placed all bulkhead line laws in Chapter 30. The laws changed the name of "shoreline" to bulkhead line, and acknowledged previously existing shorelines as valid bulkhead lines (s. 30.04, Wis. Stats.) Section 30.05 declared that submerged lands of Lake Michigan previously granted to municipalities by the Legislature were exempt from bulkhead line or permit requirements. Section 30.06, Wis. Stats., allowed the Public Service Commission to waive state jurisdiction on federally navigable waters to the federal government, upon assurance that comparable federal water laws would be enforced so as to avoid state duplication of effort. Such a waiver, however, has not occurred.

Section 30.11, Chapter 441, Laws of 1959, is similar to the current version of Section 30.11, Wis. Stats., except that no provision was made in 1959 for bulkhead line/lease combinations. In theory, it appeared that all bulkhead lines would have to conform as nearly as practicable to the existing shore, or they could not be approved.

In 1961, ss. 30.11 and 24.39, Wis. Stats., were modified by Chapter 535. Section 24.39(4) was created, which established the rules under which lakebed or streambed controlled by the state could be leased. Leases could only be for navigation improvement or harbor construction, or if the riparian owner was a municipality, the leased land could be used for recreational activities related to navigation.

The scope of s. 24.39, Wis. Stats., was restricted to Lake Michigan, Lake Superior, the Mississippi and St. Croix rivers, the Fox River from Green Bay to the Wolf River, and to those portions of other waterways where there are Army Corps of Engineers maintained navigation channels. Section 30.11(2) was modified to allow for bulkhead line/lease combinations which deviated substantially from the existing shoreline. This provision was designed to allow leasing of lake and streambeds for harbor and navigation improvement. Additionally, prior to the execution of any lease, the Public Service Commission was required to make a finding that the project was "consistent with the public interest."

In 1963, the requirement of geographical conformity of a proposed bulkhead line with the existing shore was examined by the Wisconsin Supreme Court. The Town of Ashwaubenon proposed to fill 137 acres of the Fox River near Green Bay behind a 12,700-foot long bulkhead line. The line extended as much as 1,000 feet into the Fox River, which was less than 2,600 feet wide at the point. The filled land was primarily intended for private use by a paper company, including the docking and unloading of ships.

The Public Service Commission rejected the bulkhead line on the grounds that the line failed to conform as nearly as practicable to the existing shore. The Wisconsin Supreme Court decided, in a 4 to 3 decision, that factors other than simple geographical conformance could be weighed in the determination (Town of Ashwaubenon vs. PSC, 22 Wis. 2nd 38, 1963). The other elements the PSC could have considered were, according to the Court:

1. Existing and potential uses of the immediate area

2. Engineering complications

3. The cost of dredging and filling

4. The prospect of damage to scenic or recreational use of the river

5. The presence of pollution

6. The potential influence of the project on navigation

The Court went on to say:

> Previous decisions of this court have authorized limited alterations of the shoreline ....
>
> Recognizing that the proposed Ashwaubenon bulkhead line constitutes a greater intervention than has previously been approved by earlier decisions of this court in its evaluation of the trust doctrine, we must determine whether the legislature contemplated a trust to the extent here proposed ....
>
> In our opinion, the fair interpretation of sec. 30.11, Stats. 1959, requires the conclusion that the legislature did in fact authorize the type of invasion of navigable waters which is proposed in this case, subject to the safeguards previously referred to. We do not find that the trust doctrine forecloses the legislature from this course. The standards prescribed by the legislature constitute adequate protection to the public and, thus, there is no neglect by the trustee of its responsibilities.

Curiously enough, the decision reached in this case was based upon the standards set forth in s. 30.11, Wis. Stats., in 1959, since that was the year the bulkhead line application was filed. In 1961, the laws and standards were changed (as previously described) to allow bulkhead line/lease combinations in this portion of the Fox River, but the Court applied the standards in effect at the time of application. The real significance of this case is the indication of the feelings of the Court with respect to bulkhead lines and the Trust Doctrine.

In 1969, s. 30.11(5), Wis. Stats., was modified to provide for department authority to reject proposed leases if they appeared to threaten excessive wildlife destruction. In addition, the Department was empowered to add a restriction on to the lease to protect public rights. This statute remains today as it was written in 1969.

STANDARDS

Statutory

Section 30.11, Wis. Stats.

1. Bulkhead lines may only be established by municipalities.

2. Bulkhead lines must be established in the public interest.

3. Bulkhead lines must conform as nearly as practicable to the existing shores.

4. Bulkhead lines may be approved farther from the existing shore if they are consistent with and part of a lease executed by the board of commissioners of public lands.

5. Bulkhead lines must not abridge the riparian rights of riparian proprietors.

6. A bulkhead line does not become final until it is filed according to the procedure in s. 30.11(3), Wis. Stats.

Section 24.39, Wis. Stats.

1. Prior to the execution of any lease by the board of commissioners of public lands, the Department must make a finding whether the proposed physical changes resulting from the lease are consistent with the public interest.

2. The Department shall not approve the lease if it appears to threaten excessive destruction of wildlife habitat.

3. The board of commissioners of public lands must include in the lease such limitations on final use as are determined by the Department.

4. A bulkhead line/lease may be rescinded in accordance with the procedures in s. 30.11(5)(c) upon complaint by any citizen that the use made of the leased rights is inconsistent with the purpose of the lease.

5. Leases of public land shall be made only for a full and fair consideration paid to the state. The amount and terms of payment is set by the commissioners of public lands.

6. All leases shall be consistent with the requirements of Chapter 26, Wis. Stats., relating to Department authority affecting the lease and sale of state park land and forest land.

7. The board of commissioners of public lands shall, so far as it finds desirable and practicable, utilize information and services of the Department in negotiating leases.

8. Leases must be to riparian owners for the improvement of navigation or for the improvement or construction of harbor facilities. If the riparian proprietor is a municipality, the lease may be for the improvement or provision of recreational facilities related to navigation for public use.

9. All revenues from leases shall be paid into the general fund.

10. Leases may only be executed in waters defined in s. 24.39(4)(d), Wis. Stats., including Lakes Michigan and Superior, the Mississippi and St. Croix Rivers, the Fox River from Green Bay to the Wolf River, and to those portions of other bodies of water where there is a Corps of Engineers maintained commercial navigation channel.

11. Lease terms must not exceed 50 years. Lessees have the first priority to obtain a new lease upon expiration of the old lease.

12. Any sublease of rights gained under a lease must be consistent with any restrictions imposed on the original lease.

13. Leases may be terminated in accordance with s. 24.39(5)(g) for non-use or improper use after five years.

14. All rights or leases entered into prior to 1961 remain in force.

Administrative

1. NR 1.95, Wis. Adm. Code, establishes general standards to be applied by the department in decisions affecting wetlands. The department shall consider proposals which require its approval with the presumption that wetlands are not to be adversely impacted or destroyed and that the least overall environmental impact shall result.

2. NR 115, Wis. Adm. Code, establishes administrative standards which must be followed by counties in their administration of shoreland zoning ordinances. The Department must reflect these standards in approvals issued pursuant to s. 30.11, Wis. Stats.

3. NR 116, Wis. Adm. Code, establishes administrative standards for floodplain management which must be followed by local units of government. These standards shall be reflected in state approvals granted pursuant to s. 30.11, Wis. Stats.

4. NR 117, Wis. Adm. Code, establishes standards which cities and villages must follow in zoning wetlands within the shoreland area.

5. NR 118, Wis. Adm. Code, establishes standards for county, city and village zoning along the Lower St. Croix River.

6. NR 150, Wis. Adm. Code, establishes procedures for Department compliance with s. 1.11, Wis. Stats. Bulkhead lines are type III actions requiring issuance of a news release and leases are Type II actions, hence require the preparation of an Environmental Assessment.

7. NR 302, Wis. Adm. Code, provides guidelines for allowable development along designated wild and scenic rivers.

Administrative Interpretations

1. Establishment of a federal "harbor line" does not eliminate the need for a state bulkhead line or lease. A bulkhead line means "shoreline or property line in the sense of high-water mark". Bulkhead lines should not be used to create substantial parcels of usable land, since the lands created "become the property of the riparian owners" (49 OAG 126, 1960). Note that this portion of this opinion was overruled by 63 OAG 446 (1974).

2. A bulkhead line ordinance does not become effective until it is correctly filed according to s. 30.11, Wis. Stats. The approved bulkhead line ordinance and map may be filed by the recipient at any time after receiving state approval. When territory is annexed by a municipality, any approved bulkhead lines automatically transfer to the newly governing municipality (64 OAG 112, 1975).

3. Where title to submerged lands in Lake Michigan has been granted to a municipality by the Legislature, the Department has no authority to issue bulkhead lines (BLS opinion 4-20-73).

4. Upon revocation of a bulkhead line, any filled lands become illegal deposits and are subject to enforcement action by the Department. Bulkhead lines may be revoked pursuant to departmental proceedings (the exact proceedings are not specified in this opinion), or the municipality may apply to modify (or remove) the existing bulkhead line.

   The Department may include conditions on any bulkhead line approval to guarantee placement of fill within a specified time period. The bulkhead line may not require the giving up of uplands by a riparian owner as compensation for "giving" the riparian owner lakebed behind the line (BLS opinion 10-31-74).

5. The establishment of a bulkhead line does not grant full title to the bed landward of the line (note that this opinion overrules part of 49 OAG 126). A riparian owner must obtain a permit or contract under s. 30.20, Wis. Stats., prior to dredging the bed landward of a bulkhead line.

   The bulkhead line may serve to replace the OHWM for purposes of applying s. 30.19, Wis. Stats., but this must be determined on a case by case basis. Under most circumstances, the original OHWM should be used for this purpose (63 OAG 109-74).

6. A lease under s. 24.39, Wis. Stats., must be accompanied by an approved bulkhead line under s. 30.11, Wis. Stats., since the lease does not authorize any work at the project site (BLS opinion 4-1-75).

PROCESS

Application

The application for a bulkhead line follows the procedure set forth in Manual Code 3506.1. Manual Code 3500.6 assigns the authority to approve the map and legal description to the Director of the Bureau of Water Regulation and Zoning, while the accompanying ordinance is approved by the District Director.

Specific guidance on the application requirements is found in "BULKHEAD LINE INFORMATION REQUIREMENTS" (copy enclosed). The application consists of six copies of the proposed map and ordinance submitted to the appropriate District or Area office.

If the project consists of a bulkhead line/lease combination, the application should also indicate the exact area proposed for lease, and the intended use of the leased area.

Field Investigation

The purpose of the field investigation is to determine whether the proposed bulkhead line or lease meets the required statutory standards. Department personnel should consult early with concerned parties before any expensive surveys are undertaken. If it appears that the proposed bulkhead line cannot be approved because it fails to meet statutory standards, the parties should be explicitly informed of the problem. There is no point wasting time and money on a project which will ultimately be denied.

On an initial reconnaissance survey, the investigator should check to see how closely the proposed bulkhead line conforms to the existing shoreline. Bulkhead lines may deviate from the shoreline to allow for minor regularization of the shoreline, but only if the regularization is in the public interest. Substantial creation of land is not acceptable unless a lease is secured pursuant to section 24.39, Wis. Stats.

The investigation of bulkhead lines should examine the following factors:

1. The effect of bulkhead line approval on water quality.

2. Potential impacts on fish and game habitat.

3. The ability of the municipality to insure timely placement of fill behind the bulkhead line. If it appears that filling will be done piecemeal by the affected riparians, thus creating stagnant finger channels, the bulkhead line may be denied.

4. The potential impacts of bulkhead line approval on the riparian rights of others, including their rights to access and navigation.

5. The effect on flood flow capacity of a stream.

6. Any potential conflict between the bulkhead line and local shoreline zoning and floodplain zoning. Bulkhead lines which may not comply with local zoning should be conditioned upon local zoning approval.

7. For a bulkhead line/lease combination, the bulkhead line need not conform closely to the existing shoreline. The investigator should determine exactly what use is intended for the leased land, and specifically what wildlife habitat will be affected and how severely. If the intended use of the leased land does not conform to statutory requirements, the proposal must be rejected. Obviously, if the lease is proposed on lands not subject to leasing arrangements (s. 24.39(4)(d), Wis. Stats.), the proposal cannot be considered.

NOTICE AND HEARING REQUIREMENTS

There is no statutory requirement to provide public notice of any bulkhead line proposal. For a proposed lease under s. 24.39, Wis. Stats., the Department must notify the clerk of the county and the clerk of the city, village or town where the bulkhead line is located, the Department of Health and Social Services, and the U.S. Army Corps of Engineers at least 30 days prior to determining whether or not the proposed lease is in the public interest. A hearing is not required for bulkhead line approval, and is discretionary for lease approvals (s. 30.11(5)). Any decision by the Department may be subject to appeal under sections 227.42, 227.52, and 227.53, Wis. Stats.

Upon receipt of a complaint by any member of the public that the current use made of rights leased under s. 24.39, Wis. Stats., is inconsistent with the original grant or the public interest, the Department must publish a class 2 notice of hearing under Chapter 985, Wis. Stats. After publishing the notice, the Department must hold a hearing to determine the facts. Section 30.11(5)(c), Wis. Stats., specifies procedures to be followed in the event the Department finds that the lease is no longer in the public interest.

FINAL DISPOSITION

The bulkhead line ordinance is approved by letter from the District. The map and legal description are approved by the Bureau. The final approval should contain two copies of the approved ordinance and map. All conditions which are to be imposed must be specified in the approval letter. Conditions which may be imposed include time limits on filling, height of fill behind the line, type of fill which is allowable, and erosion control measures which are required during the filling. The conditions of approval are subject to appeal under sections 227.15 and 227.16, Wis. Stats., and this fact must be noted in the approval letter. Note that the bulkhead line is not approved until the map and ordinance are properly filed. If the final disposition is denial, a denial letter should be sent to all affected parties, advising them of appeal rights under sections 227.42, 227.52, and 227.53, Wis. Stats., and specifying the reasons for denial.

MONITORING

Bulkhead line or lease approvals should require the applicant to notify the Department five days before commencing the filling operation and five days after completion of the work. There should be a follow-up inspection to determine if the final project description meets the approved description. If violations are noted, enforcement action should be considered to resolve the violations.

ENFORCEMENT

Several routes appear to be open to the Department by which a bulkhead line approval may either be rescinded or modified. One route would be for the Department to initiate a s. 30.03, Wis. Stats. proceeding to rescind or modify the previously approved bulkhead line. The Department's authority to initiate such a proceeding is set forth in Town of Ashwaubenon v. PSC, supra, which holds that a bulkhead line approval is "subject to revocation at the pleasure of the Legislature." Since the Department serves as the Legislature's delegate regarding the granting of bulkhead approvals, the Department can similarly act to revoke approvals either in whole or in part. The basis for revocation must be the failure of the approved bulkhead line to meet the public interest or that, as implemented, the bulkhead line is not a regularization of the shoreline.

Another route is for the municipality to take the initiative. Subsection 30.11(1), Wis. Stats., allows a municipality to reestablish an already approved bulkhead line; reestablishment is again subject to Department approval. Such approval is based upon the standards set forth in subsection 30.11(2), Wis. Stats. A new ordinance to reestablish the bulkhead line could establish the original ordinary high water mark as the boundary for properties where no bulkhead line improvements have been made. All other properties would be allowed to remain essentially unaffected.

Any unauthorized structure beyond a bulkhead line constitutes an obstruction to navigation, and either the Department, the municipality or any citizen may initiate a s. 30.15, Wis. Stats., procedure against the owner of such a structure. The Department may also initiate a s. 30.03/30.12, Wis. Stats., action against any structure or pier extending beyond an authorized bulkhead line.

Upon revocation of a bulkhead line, any fill or structures between the original ordinary high water mark and the bulkhead line become illegal, unless a permit under s. 30.12, Wis. Stats., is obtained for the structures. Action may be taken against unauthorized structures under ss. 30.03, 30.12 and 30.15, Wis. Stats., and of course the same applies to any fills.

PUBLIC INFORMATION

The Department publication "BULKHEAD LINE INFORMATION REQUIREMENTS" is available to explain procedures for obtaining bulkhead line approvals. Additional useful publications include "PUBLIC OR PRIVATE? I: Navigability," "PUBLIC OR PRIVATE? II: The Ordinary High Water Mark," and "Saving Your Shoreline."

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CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

Date: January 20, 1983 *File Ref:* 3550 (WMC)

To: District Directors

PMMS Response
Put in: Chp 60, Water Reg. Hndbk
Chp 15, FL/SL Guidebook

From: Robert W. Roden

Distribution: All Program Staff

Subject: Relationship of Bulkhead Lines to County Shoreland Zoning

This memo is in response to questions raised by Ron Fassbender concerning the relationship between county shoreland zoning and approved bulkhead lines.

The questions posed by Ron and the responses are as follows:

1. For purposes of county shoreland zoning, is the 75 foot building setback measured from a bulkhead line (once filled) or from the ordinary high-water mark?

   The 75 foot setback should be measured from the waterward edge of any legal fill placed behind an approved bulkhead line. For the purpose of administering local shoreland zoning ordinances and ch. NR 115, the waterward edge of such fill should be treated administratively as a new ordinary high-water mark. This "new ordinary high-water mark" must be considered revocable since the Wisconsin Supreme Court has clearly stated in Ashwaubenon v. Public Service Commission, 22 Wis. 2d 38 (1963), that the state has the right to revoke any previously approved bulkhead line and the right to have fill which was placed on lakebed or streambed removed.

2. Assuming the answer in question no. 1 is the OHWM, does anyone control development on the filled lakebed? (In this case the county assumes they have no jurisdiction below the OHWM and that structures can be placed up to the bulkhead line)

   Treating the waterward edge of fill placed behind an approved bulkhead line as a "new ordinary high-water mark" may simplify the situation from the county's point of view, but technically, the county's shoreland zoning jurisdiction is not limited to areas above the ordinary high-water mark. Section 144.26, Wisconsin Statutes, authorizes municipal shoreland zoning regulations for "lands under, abutting or lying close to navigable waters." Section 59.971 requires each county to zone "all shorelands in its unincorporated area" and defines shoreland to mean the area "within" 1000 feet of the ordinary high-water mark of a lake, pond or flowage and 300 feet of the ordinary high-water mark of a river or stream, or to the landward side of the floodplain, whichever distance is greater. If one were to draw shoreland boundaries on a map, lakebeds and streambeds would clearly be within the shoreland boundaries. This does not mean that a county must regulate all activities which are conducted below the ordinary high-water mark of all the navigable bodies of water within the county. It only means that the minimum standards for shoreland zoning ordinances found in ch. NR 115 must be applied to the beds of navigable waters, where pertinent. Where any structure other than a pier, boat hoist or boathouse is proposed to be placed on fill placed between an approved bulkhead line and the original ordinary high-water mark, ch. NR 115 requires that the county enforce a 75-foot setback from the

ordinary high-water mark (in this case, the "new ordinary high-water mark") unless existing nearby structures are located closer to the "new ordinary high-water mark" (which would automatically allow a reduced setback) or unless the County Board of Adjustment has granted a variance after finding that the imposition of the 75 foot setback would constitute "an unnecessary hardship" for the landowner in question.

The county government and the Department have concurrent jurisdiction over development on fill that is placed between an approved bulkhead line and the original ordinary high-water mark, because section 30.11(4), Wis. Stats., provides that: "Riparian proprietors may place solid structures or fill up to such line." Clearly, section 30.11(4) would allow the placement of the same structures that would be allowed under section 30.12. Other types of structures should not be a problem in the future because of the fact that a bulkhead line 75 feet or more from the ordinary high-water mark is not likely to be approved by the Department under current bulkhead line standards. There should be no need for the Department to exert control (beyond that specified in the bulkhead line approval) over development on filled lakebed or streambed in the future, because that application of the 75 foot setback required by the local shoreland zoning ordinance will severely restrict the placement of all structures except piers, boat hoists and boathouses on the filled area between the approved bulkhead line and the ordinary high-water mark.

It should be noted that the specific mention of "solid structures" in section 30.11(4), Wis. Stats., does not, by implication, prohibit the placement of nonsolid piers by riparian landowners. Section 30.13, Wis. Stats., would still be applicable regardless of whether a bulkhead line has been established. If the requirements of section 30.13 are met, a riparian would be able to put a nonsolid pier between an established bulkhead line and the ordinary high-water mark if the area has not been filled, or waterward of an established bulkhead line if fill has been placed out to the bulkhead line.

3. Can a boathouse be built below the OHWM but behind the bulkhead line (refer to s.30.12)?

For bulkhead lines approved after December 16, 1979 (the effective date of section 30.121, Wis. Stats.), boathouses are not allowed on filled lakebed or streambed which has been placed pursuant to section 30.11(4), Wis. Stats. Section 30.121 prohibits the placement or construction of boathouses and fixed houseboats beyond the ordinary high-water mark of any navigable waterway. Since this is a statutory prohibition with no exceptions provided for, the Department cannot create an administrative exception (in other words, inspite of the fact that we may treat an approved bulkhead line as a "new ordinary high-water mark" for the purpose of administering ch. NR 115, for the purpose of applying section 30-121, Wis. Stats., "original" ordinary high-water mark must be used).

For bulkhead lines approved on or before December 16, 1979, we will abide by the conditions specified in the approval (and allow boathouses unless they were specifically prohibited), unless we are willing to seek amendment or revocation of the bulkhead line approval.

Reviewed By: Ed Brick
Linda Wymore
Joe King
Dan Holzman
Bob Sonntag

RWR:LW:jkb

Attach.

3568H

CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

DATE: November 15, 1985 FILE REF: 3550

TO: District Directors

(WMC) PMMS Response
Insertion: Chapter 60, Water Regulation Handbook

FROM: Robert W. Roden - WZ/6

Distribution: Program Staff

SUBJECT: Bulkhead Line Approval Condition

This memo is in response to questions Ed Bourget has asked about a condition included in past bulkhead line approvals that states... "Filling authorized by establishment of this bulkhead line shall be completed within five years of the date of this approval, or action may be initiated to rescind this approval."

The questions asked by Ed and the responses are as follows:

1) Does this mean that the bulkhead line is rescinded after five years or can they continue to fill in the area behind the bulkhead line?

   The phrase "Action may be initiated" in the above condition indicates that additional filling behind the bulkhead line may continue after expiration of the five year period unless action is taken by the Department to rescind or modify the approval.

2) How can we rescind the bulkhead line? What formal steps should we follow?

   Several routes appear to be open to the department by which a bulkhead line approval may either be rescinded or modified. One route would be for the department to initiate a s. 30.03(4), Wis. Stats. proceeding to rescind or modify the previously approved bulkhead line. The department's authority to initiate such a proceeding is set forth in Town of Ashwaubenon v. PSC, 22 Wis. 2d 38 (1963) supra, which holds that a bulkhead line approval is "subject to revocation at the pleasure of the Legislature." Since the Department serves as the Legislature's delegate regarding the granting of bulkhead approvals, the Department can similarly act, after hearing, to revoke approvals either in whole or in part. The basis for revocation must be the failure of the approved bulkhead line to meet the public interest or that, as implemented, the bulkhead line is not a regulatorization of the shoreline.

   Another route is for the municipality to take the initiative. Subsection 30.11(l), Wis. Stats., allows a municipality to reestablish an already approved bulkhead line; reestablishment is again subject to department approval. Such approval is based upon the standards set forth in Subsection 30.11(2), Wis. Stats. A new ordinance to reestablish the bulkhead line could establish the original ordinary high water mark as the boundary for properties where no bulkhead line improvements have been made. All other properties would be allowed to remain essentially unaffected.

3) Can you interpret the above condition?

Unless an action is initiated, as identified under 2) above, to rescind or modify the original bulkhead line approval, filling behind the bulkhead may continue past the five year period stated in the above condition.

Reviewed By: John Coke
Mike Cain
Scott Hausmann

RWR:JC:sm
6937K

CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

Date: February 3, 1987 *File Ref:* 3500

Put In: Chapter 60, Water Regulation Handbook
To: District Directors

Distribution: All Program Staff

From: Scott Hausmann - WZ

Subject: Interpretation of ss. 30.05, 30.772 and 30.773

Attached is a response from Mike Lutz to Greg Pilarksi's questions regarding the State's authority or lack thereof to regulate mooring buoys in areas where lakebed grants have approved.

Please place in Chapter 60 of your Water Regulation Handbook.

SH:DS:el

CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

DATE: February 11, 1987 FILE REF: 8300

TO: Dale Simon - WZ/6

FROM: Michael A. Lutz - LC/5

SUBJECT: Lakebed Grants and Mooring Buoy Regulation

You have inquired as to whether s. 30.05, Stats., has any effect on the state's application of ss. 30.772 and 30.773, Stats., to areas of Lake Michigan which have been the subject of a lakebed grant. In this instance, the area involved is Milwaukee harbor area which was the subject of a lakebed grant to Milwaukee County.

Section 30.05, Stats., states as follows:

> "Nothing in this chapter relative to the establishment of bulkhead or pierhead lines or the placing of structures or deposits in navigable waters or the removal of materials from the beds of navigable waters is applicable to submerged shorelands in Lake Michigan, the title to which has been granted by the state to a municipality."

Sections 30.772 and 30.773, Stats., generally regulate the placement of moorings in navigable waters. The question to be answered is whether the regulation of moorings is the regulation of a structure which was intended to be exempt from ch. 30, Stats., by virtue of s. 30.05, Stats.

I have been involved in prior litigation in which the status of a mooring buoy as a structure was at issue. Attached is my brief in a case in which the Department asserted that a mooring buoy was, in fact, a structure. The position which I asserted was accepted by the hearing examiner and upheld by the circuit court and the court of appeals.

While ss. 30.772 and 30.773, Stats., do regulate obstructions to navigation, they do so by regulating structures, i.e., mooring buoys. In my view, the status of a mooring buoy as a structure is inescapable and the exemption of s. 30.05, Stats., is therefore applicable.

You have also inquired as to whether a non-riparian can place mooring buoys in a lakebed grant area. In my view they can, but with the permission of the county which is the owner of the lakebed.

Your question on permits and permitting authority are made moot by the applicability of s. 30.05, Stats. Sections 30.772 and 30.773, Stats., are simply not applicable. Permit requirements in the lakebed grant areas are entirely up to the county.

Your assumptions on anchoring are correct. Temporary anchoring is differentiated by both the Department and Federal government from the placement of a structure such as a mooring anchor on the bed with the accompanying attachment of a mooring buoy. Restrictions placed by the state or local unit of government on mooring buoys have nothing to do with the right of temporary anchoring. However federal restrictions or permit requirements dealing with the placement of mooring bouys in federal waters would still be applicable.

If I can be of further assistance in this matter, feel free to contact me.

MAL:ss
Attach.

cc: Dale Morey - LE/5 (w/attach)
Greg Pilarski - SED (w/attach)
Mike Cain - LC/5 (w/attach)
Jim Kurtz - LC/5 (w/attach)
8951K

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

INVESTIGATION ON MOTION OF THE DEPARTMENT OF NATURAL RESOURCES OF AN ALLEGEDLY ILLEGAL PLACEMENT OF MOORING BUOYS ON THE BED OF LAKE GENEVA, WALWORTH COUNTY, BY AUDREY MILLIETTE, ET AL.

CASE No. IH-81-51

BRIEF OF THE DEPARTMENT OF NATURAL RESOURCES

FACTS

In an application dated April 21, 1980 (Exhibit 1), and in an application dated March 20, 1980 (Exhibit 2), Audrey Milliette and Duane Assmann respectively submitted a form entitled, "APPLICATION FOR PLACEMENT OF WATERWAY MARKER IN WATER WITHIN THE CITY OF LAKE GENEVA, COUNTY OF WALWORTH, WISCONSIN." (Form 8700-58). In a letter dated June 6, 1980, addressed to Mayor Richard Folman of the City of Lake Geneva and signed by Dale Morey, the Department's Boating Law Coordinator, (Exhibit 3), the Department of Natural Resources indicated that mooring buoy permits would not be issued to Ms. Milliette and Mr. Assmann, among others. Copies of this letter were sent to Ms. Milliette and Mr. Assmann (Hereinafter referred to as the respondents). As a reason for denial, the Department indicated the following:

> "It is the Department's opinion that these property owners are not riparian owners. These property owners have covenants to their deeds which allow them access to the lake through a public park. The covenants also allow the above named property owners to construct a pier and a bath or boat house."

When the respondents continued to place mooring buoys subsequent to the denial of the mooring buoy permits, the Department initiated the present action. In a stipulation signed by the attorney for the respondents and dated November 17, 1981 (Exhibit 4), the respondents agreed that they did own property on Wrigley Drive in Lake Geneva and that such property was subject to the Baker Park dedication. They further acknowledged that they did place mooring buoys in the waters of Lake Geneva in the vicinity of their property. The respondents stated at the hearing on September 23, 1983, that they were still placing mooring buoys in the waters of Lake Geneva.

I. THE RESPONDENTS ARE PLACING MOORING BUOYS IN THE WATERS OF LAKE GENEVA WITHOUT A PERMIT AS REQUIRED BY S. 30.12, STATS., S. 30.74, STATS., AND S. NR 5.09, WIS. ADM. CODE.

Section 30.12(l), Stats., states:

> "(1) GENERAL PROHIBITION. Except as provided under Sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:
>
> (a) to deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or
>
> (b) to deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.
>
> Section 30-15(l)(d), Stats., provides for a forfeiture from any person who:

(d) Constructs or places any structure or deposits any material in navigable waters in violation of Section 30.12 or Section 30.13."

Taken together, the statutes are straight forward and unambiguous. Unless a permit has been granted no structure may be placed on the bed of navigable waters. Section 30.12(i), Stats., provides that only riparian owners may apply for and be granted a permit.

A mooring buoy consists of a float attached by chain to a weight, often made of concrete, resting on the floor of a body of water. The Wisconsin Attorney General has discussed whether such an object is a structure subject to s. 30.12, Stats., as follows:

> "If an unattended boat is attached to the bed of a navigable waterway for a period of time, and in a manner which connotes permanency, e.g., spud poles, chain attached to cement, filled drum or an object driven into the riverbed, it would, in M opinion, be a prohibited 'structure' in violation of sec. 30.12, Stats., and may also constitute an unlawful obstruction to navigation in violation of sec. 30.15. If the unattended and anchored boat is left on navigable water for an unreasonable length of time, it constitutes a violation of sec. 30.15.
>
> Since sec. 30.15(3), Stats., provides that each day an obstruction to navigation exists constitutes a separate violation, it is likely that leaving such unattended and anchored boat for more than one day would prima facie be a violation." 630 AG 601, 603 (1971)

In its most recent decision involving s. 30.12, Stats., the Wisconsin Supreme Court stated as follows:

> "Sec. 30.12, Stats., regulates the placement of structures on the beds of navigable waters. 'Structure' is not defined for purposes of sec. 30.12. Sec. 990.01(l), relating to general rules of statutory construction, indicates that all words and phrases must be construed according to their common and approved usage. The common and approved meaning of a word can be ascertained by reference to a recognized dictionary. Interest of B.M., 101 Wis. 2d 12, 18, 303 N.W. 2d 601, 605 (1981).
>
> Webster's Third New International Dictionary 2267 (1961) defines 'structure' as 'something constructed or built ... something made up of more or less interdependent elements or parts..'" State v. Bleck 114 Wis. 2d 454, 463 (1983)

The Wisconsin Attorney General has clearly stated that a mooring buoy can be a structure subject to s. 30.12, Stats. Certainly, attaching a boat to a mooring buoy for the entire boating season as done by the respondents gives the "permanency" and "unreasonable length of time" as required by the Attorney General. The Supreme Court definition would also include a mooring buoy as the weight is most often "something constructed or built" (e.g. a concrete form) with "interdependent elements or parts". (e.g. the attachment for the chain, the chain and the float).

The respondents have placed structures in the waters of Lake Geneva. They do not have a permit issued under s. 30.12, Stats. Nor do they have any other type of permit or authorization for the mooring buoys which they placed. Section 30.12(l), Stats., does not require that a permit satisfying its requirements be issued only pursuant to s . 30.12(2), Stats. Structures may be authorized by a "permit granted by the department pursuant to statute". The Legislature has established a regulatory system for mooring buoys in s. 30.74(2), Stats., which states as follows:

> "UNIFORM NAVIGATION AIDS. (a) By rule establish uniform marking of the water areas of this state through the placement of aids to navigation and regulatory markers. Such rules shall establish a marking system compatible with he system of aids to navigation prescribed by the U.S. coast guard and shall give due

regard to the system of uniform waterway markers approved by the advisory panel of state officials to the merchant marine council, U.S. coast guard. After January 1, 1968, no municipality or person shall mark the waters of this state in any manner in conflict with the marking system prescribed by the department. Any marker which does not comply with such marking system by January 1, 1968, is deemed an unlawful obstruction to navigable waters and may be removed in accordance with law.

(b) For purposes of this section 'aids to navigation' means buoys, beacons and other fixed objects in the water which are used to mark obstructions to navigation or to direct navigation through safe channels; 'regulatory markers' means any anchored or fixed marker in the water or anchored platform on the surface of the water, other than aids to navigation, and shall include but not be limited to bathing beach markers, speed zone markers, information markers, mooring buoys, fishing buoys and restricted activity area markers."

The Department is given specific authorization to establish by rule a system of uniform marking of water areas through the placement of aids to navigation and regulatory markers. Under s. 30.74(2)(b), Stats., the definition of regulatory markers specifically includes mooring buoys.

The Department has in fact enacted the rules required by s. 30.74(2), Stats. The Department's regulatory program for aids to navigation and regulatory markers is found in s. NR 5.09 Wis. Adm. Code (Appendix A). Specifically, s. NR 5.09(3) Wis. Adm. Code states as follows:

"AUTHORITY TO PLACE MARKERS. (a) No waterway marker shall be placed on, in, or near the waters of the state unless such placement is authorized by an agency or political subdivision of the state having power to give such authorization, except that the provisions of this section shall not apply to private aids to navigation under the jurisdiction of the U.S. coast guard.

(b) Such agency or political subdivision of the state will, prior to authorizing placement, obtain the necessary clearances of any federal and state agencies concerned.

(c) The agency or political subdivisions of the state authorizing the placement of waterway marker will inform the department of the following:

1. Exact location of the marker, expressed in latitude and longitude, or in distance and direction from one or more fixed objects whose precise location is known.

2. The description and purpose of the marker, including its identifying number, if any, as required by subsection (2) (a)5 above."

The "agency or political subdivision of the state having power to.give such authorization" is in this instance the City of Lake Geneva. The "necessary clearances of any federal and state agencies concerned" refer here to the approval of the Wisconsin Department of Natural Resources.

In this instance, the respondents did apply for a mooring buoy permit on a form provided by the Department. (Exhibits I & 2) Where the Department refused to grant its approval, (Exhibit 3), the City of Lake Geneva was without jurisdiction to issue the respondents mooring buoy permits. The respondents were notified of the Department's disapproval of their application and acknowledged at the hearing that they had never received any type of permit for the placement of their mooring buoys. Such being the case, they were clearly in violation of the provision in s. NR 5.09(3)(a), Wis. Adm. Code which precludes the placement of a waterway marker without a permit, which is authorized by both the local unit of government and the Department of Natural Resources.

In summary, a permit is needed to place a mooring buoy. If for any reason the permit process of s. NR 5.09, Wis. Adm. Code is held to be inapplicable, then mooring buoys still remain a structure subject to an s. 30.12, Stats., permit.

II. THE RESPONDENTS LACK THE RIPARIAN STATUS NECESSARY TO PLACE MOORING BUOYS IN THE WATERS OF LAKE GENEVA.

CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

DATE: March 17, 1987 FILE REF: 3500

TO: District Directors

FROM: Robert W. Roden - WZ/6

PMMS Response Insertion: Chapter 60, Water Regulation Handbook

Distribution: All Program Staff

SUBJECT: Allowable Uses of Lakebed Grant Areas

A number of questions have arisen recently regarding the permissible uses of submerged lakebed granted by the Legislature to municipalities. While these questions pertain to legislative lakebed grants, the same principles generally apply to all waterways (not just the Great Lakes) since both the Legislature's and the Department's powers to authorize development on lake and river bed are limited by the "Public Trust Doctrine" (Article IX, Section 1, Wisconsin Constitution, as interpreted by the Wisconsin Supreme Court). Of course, the Department's powers to authorize lakebed development are more limited in scope than those of the Legislature due to the applicability of the statutes which we administer.

General information regarding permissible uses of submerged lakebed is attached for your information. The most quotable item is a letter from former Attorney General Bronson LaFollette to State Representative Neubauer. The following are responses to specific questions which have been raised by Southeast District:

1. Is "para-sailing" an allowable use of lakebed which was granted to a municipality for "public park, parkway and highway purposes?"

   Para-sailing is essentially a navigation-oriented recreational use of a waterway. While it is more demanding of surface water space than many other such uses, it still doesn't differ in principle from the status accorded to boating or water-skiing. Recreational uses are generally consistent with the concept of public parks and would be appropriate in this instance if they were clearly under the control of Milwaukee County (the grantee of the lakebed). Such control would have to be clearly stated in any concession agreement or other legal arrangement allowing this use to take place. Surface water use conflicts could arise and would have to be addressed at the time they occur, perhaps through local regulation.

2. Would a "fast-food restaurant" be permissible on submerged or filled lakebed granted to a municipal park, parkway and highway purposes?"

   Restaurants, unless an integral part and clearly intended to serve only the patrons of an allowable use of lakebed are not, in themselves, permissible. The reasoning for this is spelled out in the attached materials, in particular, the letter from Attorney General LaFollette to Representative Neubauer. We would not draw any distinction between a "first-class restaurant" and a "fast-food restaurant" for that purpose.

Incidentally, a number of other non-public uses of lakebed (e.g., condominiums) are also contrary to guidelines established by the Supreme Court. Because of a particular situation in Milwaukee where it appears that several legislative lakebed grants overlap, I also want to address the question of what uses of lakebed would be allowable in such a case (predicated on the assumption that all uses authorized in the grant are constitutionally permissible). Where two or more legislative lakebed grants apply to the same area, we should presume that all uses allowed by

the grants would be acceptable in that common area. If the Legislature had intended to limit uses to those spelled out in just one of the grants, it would presumably have provided for that in the more recent grant(s).

Reviewed by:

Scott Hausmann
Michael Cain

RWR:sm
Attach.
cc: George Meyer - AD/5
Jim Kurtz - LC/5
9066K

CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

DATE: December 22, 1986 FILE REF: 3550

TO: C. Topf Wells
Senator Adelman's Office
Room 8, South
CAPITOL

FROM: Robert W. Roden - WZ/6
Bureau of Water Regulation & Zoning
Department of Natural Resources

SUBJECT: Legislative Lakebed Grant Concerns

You recently asked me to provide you with the Department's concerns regarding grants of submerged lands to municipalities by the Legislature. From our perspective, there have been two general problems:

1. The purpose of some legislative grants appears to us to be inconsistent with the "public trust doctrine" as enunciated in Wisconsin Supreme Court decisions, and;

2. Development may occur on granted lakebed areas which is inconsistent with the stated purpose for which the grant was made. This may be done by riparian (shoreline) property owners other than the grantee of the lakebed or may happen with the concurrence of the grantee.

As you know, section 30.05, Stats., removes much of the authority normally given by the Legislature to the Department of Natural Resources in those areas of Lake Michigan where a legislative lakebed grant has been made to a municipality. This means that if, for example, individual riparian owners place fills in these portions of the lake, there is no effective regulatory system to require corrective actions.

Before getting into specific examples which illustrate these problems, I want to provide our perception of what the Supreme Court has stated are acceptable types of development on publicly-owned lakebed. There have been a number of cases on this subject. Perhaps the most comprehensive statement by the Court appears in two cases from 1957, State v. Public Service Commission [275 Wis. 112] and City of Madison v. State [1 Wis. 2d (252)3. Since the Madison v. State decision incorporates the reasoning contained in State v. Public Service Commission, I will only go through the criteria established by the Madison case.

The standards articulated by the court are put in terms of acceptable types of buildings but these standards could also be applied to any type of development which converts lakebed to a dry land area. These standards are:

1. A public body must control the use of the building;

2. The building must be devoted to public purposes and must be open to the public;

3. The reduction in the area of the lake resulting from the construction of the building must be very small (a more recent case relating to accumulated "minor" encroachments onto lakebed is Hixon v. Public Service Commission, 32 Wis. 2d 608);

4. No public use of the lake can be either destroyed or greatly impaired by construction of the building;

5. The loss of the public's ability to use the area of the building for "traditional" public rights in navigable waters (the rights to navigate, fish, swim, etc.) must be substantially outweighed by the benefits that would accrue to the public using the building.

In terms of the Department's concerns with some grants and lakebed developments, the first two criteria are the most significant. For the public to retain control of the use of a building, it is not necessary that the building be managed directly by public employees but it is clear that decisions on the types of uses and activities within that building and on access to the building must be left to a governmental entity and not to private interests. The requirement for a building to be open to the public speaks for itself. This does not mean there can be no control over access but access must be granted to the general public on an equal basis.

Perhaps the key element in these criteria is what constitutes a valid public purpose for a building on lakebed. We believe it is clear that the Court intended to equate the acceptable public purposes of a building with the recognized public rights in navigable waters. The Court in Madison v. State said that a proposed civic center on Lake Monona would be acceptable since the use of the building was essentially recreational. The decision implied that other types of public buildings (e.g. municipal office building, fire or police station) might be viewed differently. Since a "first class restaurant" seems to be the type of development of current interest to several communities, we have focused our recent attention on whether this type of development meets the Court's standards. Our view is that while food service facilities related to recreational uses of the lake and lakebed area are consistent with the public trust, (e.g. concession stands in parks, food service for patrons of a marina), a restaurant that was not dedicated specifically to these uses would not be. I have attached correspondence regarding proposals in Racine which expand on this reasoning.

Examples where we feel there are significant questions requiring existing or proposed uses of submerged lands granted by the Legislature to municipalities include:

1. City of Milwaukee: The "Pieces of Eight" restaurant is located in an area granted by the Legislature to the City of Milwaukee (Chapters 151 and 516, Laws of 1929). This grant was made for the purpose of aiding navigation and fisheries and was primarily for the construction of various types of harbor facilities and other facilities "not inconsistent with the improvement of navigation and fisheries in Lake Michigan." We do not see where "first class restaurants" are consistent with improvement of navigation or fisheries and such development is clearly not a harbor facility as defined in state statutes.

2. City of Kenosha: A recent lakebed grant (originally adopted in the 1983-85 budget, section 2059, and subsequently adopted as a separate bill in 1985 Wisconsin Act 81) specifies various types of development on lakebed which we believe are not consistent with the Supreme Court's standards. Examples in this grant included senior citizen subsidized rental housing and associated parking and 'low and medium-rise building development' (housing, commercial, or office development including hotels or convention centers). We do not see where these types of uses can be reasonably construed to be publicly controlled buildings for a public purpose related to navigation or recreational use of the lake.

3. City of Racine: The area in question was granted to the city in 1983 Wisconsin Act 162 for public park facilities, boat basins, docks, wharves, structures, roads and public facilities. The grant allows the City of Racine to convey all or a portion of these lands to Racine County for the same purposes. While some of the wording in the grant is admittedly vague, there is no indication that the grant was intended by the legislature to allow uses inconsistent with the Supreme Court decisions. There has been a recent proposal to construct a marina administration building with a "first class restaurant" on the second floor in a portion of this lakebed grant area. We have taken the position that this proposal is a concern, whether or not the restaurant would be county-operated or run by some private entity under contract or agreement with the county. We are also aware of a proposal to construct condominiums in the grant area and we have recently found that there are existing buildings owned by the Wisconsin Natural Gas Company which are already constructed on filled

lakebed. All of these are essentially private uses of lakebed which are inconsistent with the public trust.

The above list is probably not exhaustive by any means. As indicated above, we have found certain existing development which we feel doesn't comport with the applicable legislative grant and there may well be others. On the other hand, it appears to us that the great majority of lakebed grants are made for legitimate public purposes and most development in these areas is consistent with the purposes of the grant.

One problem with lakebed grants is the issue of who is responsible for policing development to ensure its consistency with the stated legislative purpose. It seems clear that the municipality receiving the grant has the primary responsibility. Since the Department lacks most of its usual authority in these areas, the State's ability to act to ensure proper development when a municipality does not properly supervise development appears to be limited to civil actions filed on behalf of the State by the Attorney General. Needless to say, this can be a relatively cumbersome and difficult process and it is more likely to be applied in a "corrective" manner than in time to prevent development which is contrary to the public trust doctrine.

I hope that this information is responsive to your request. Please let me know if you have further questions or concerns.

RR:hf

Attach

cc: George Meyer AD/5
Paul Heinen AD/5
Jim Kurtz LC/5

8866H

CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

DATE: March 17, 1987 FILE REF: 3500

TO: District Directors

FROM: Robert W. Roden - WZ/6

PMMS Response
Insertion: Chapter 10, Water Regulation Handbook

Distribution: All Program Staff

SUBJECT: Allowable Uses of Lakebed Grant Areas

A number of questions have arisen recently regarding the permissible uses of submerged lakebed granted by the Legislature to municipalities. While these questions pertain to legislative lakebed grants, the same principles generally apply to all waterways (not just the Great Lakes) since both the Legislature's and the Department's powers to authorize development on lake and river bed are limited by the "Public Trust Doctrine" (Article IX, Section 1, Wisconsin Constitution, as interpreted by the Wisconsin Supreme Court). Of course, the Department's powers to authorize lakebed development are more limited in scope than those of the Legislature due to the applicability of the statutes which we administer.

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the grants would be acceptable in that common area. If the Legislature had intended to limit uses to those spelled out in just one of the grants, it would presumably have provided for that in the more recent grant(s).

Reviewed by:

Scott Hausmann

MichaeY Cain

RWR:sm
Attach.
cc: George Meyer - AD/5
Jim Kurtz - LC/5
9066K

CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

August 13, 1986 File Ref: 8300

The Honorable Joseph Strohl
Wisconsin Senate
Room 331 South
State CAPITOL

Dear Senator Strohl:

You recently contacted me concerning the proposed marina development in the City of Racine. Some controversy has apparently developed concerning the City's proposal to include a large restaurant facility in one of the marina buildings which is to be constructed on publicly owned lakebed. As you are aware, contents have been made by Department staff that such a use of the lakebed area may violate the public trust doctrine.

You have been contacted by Michael A. Vidian, an alderman from the city of Racine, who has asked whether a privately owned ship could be anchored at one of the piers and be used as a restaurant facility. You have inquired whether such a ship would comply with the "public trust doctrine".

I have conferred with the Department's legal staff concerning this issue. It is their opinion that the "restaurant ship" would have essentially the same problems as the upland proposal. The public trust doctrine relates to navigable waters as well as the bed underlying those waters, and the use of an area of the navigable waters by a restaurant ship anchored adjacent to a pier interferes with the public's trust just as surely as if the restaurant ship were placed on top of fill material.

The Attorney General, in an opinion rendered in 1974, opined that a boat anchored in a waterway could, under certain circumstances, be considered a prohibited structure in violation of the public trust. The Attorney General stated, "Use of the bottom is permitted for purposes of anchoring [a] boat while it is being used in connection with the exercise of... public rights." 63 Opinions of the Attorney General 601 (1974). It is the opinion of our legal staff that the use of lakebed areas for restaurant or other commercial purposes does not constitute the exercise of public rights and is not a permitted use under the public trust doctrine.

The Attorney General responded to a similar question concerning the Racine lakebed proposal in a letter dated July 22, 1983, to Representative Jeffrey Neubauer. That letter contains a more complete discussion of these issues. I have attached a copy for your information.

I trust this information answers your questions concerning this proposal. Please contact me if you have additional questions concerning this matter.

Sincerely,
C.D. Besadny
Secretary

CDB:MJC:cal
cc: Representative Jeffrey Neubauer

JOSEPH STROHL
STATE SENATOR

July 28, 1986

Mr. Carroll D. Besadny, Secretary
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707

Dear Buzz:

There has been much controversy regarding the construction of a privately owned restaurant at Racine's harbor site. I have been contacted by Michael A.Vidian, Alderman, City of Racine, concerning this matter. Mr. Vidian lives at 1116 Florence Avenue, Racine 53402.

It has been stated that the construction of a restaurant would create legal difficulties due to the Public Trust Law. The law does not allow the use of lakebed property for this type of venture.

As a restaurant would be needed to compliment the new harbor facility, Mr. Vidian has suggested using a privately owned ship anchored at one of the piers. The restaurant-ship would then not be part of the landsite itself.

Mr. Vidian would like to know if this type of restaurant would comply with the Public Trust Law and harbor regulations.

I appreciate your consideration of this matter and look forward to your response. Please send your reply to my district office at 603 Main Street, Room 201, Racine 53403.

Sincerely,

JOE STROHL
State Senator
JS/gm/mn

cc: Michael A.Vidian, Alderman
Representative Jeffrey Neubauer

The State of Wisconsin
Department of Justice

Bronson C. La Follette, Attorney General
Ed Garvey, Deputy Attorney General

July 22, 1983

The Honorable Jeff Neubauer
State Representative
108 North, State Capitol
Madison, Wisconsin 53702

Re: Racine Lakebed Development

Dear Representative Neubauer:

You have requested my comments on the City of Racine's proposal to engage a developer to construct a private marina development on the bed of Lake Michigan. Specifically, you ask: (1) whether the proposed private development would violate the public trust doctrine, and (2) whether legislation is needed to grant lakebed for this development.

Since the proposed project is in its infant stage, we do not yet have enough information to determine whether the marina development is consistent with the public trust doctrine. I can, however, explain the guiding principles of the public trust doctrine which should govern the Legislature's and court's future determinations on the constitutionality of the project. These principles are not statutory; they have instead been carefully developed and refined over the years through scores of court cases construing Wisconsin Constitution article IX, section 1. This provision, which came verbatim from the Northwest Ordinance of 1787, provides the constitutional foundation for the "public trust" doctrine--that the state holds the beds of navigable waters in trust for use by all of its citizens:

> Jurisdiction on rivers and lakes; navigable waters. SECTION 1. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be, formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

Without going into a detailed discussion of what this trusteeship entails, reference to a few cases early in Wisconsin's statehood establishes the following basic principles.

First, the Legislature has the duty to administer the public trust in navigable waters for the benefit of all the people of the State of Wisconsin.[1] While the Legislature may delegate administrative tasks to carry out its public trust responsibility, it may not delegate complete control over any state navigable waters, or any portions thereof, or otherwise abdicate its public trust responsibilities.[2]

Second, the Legislature is powerless to divest itself of public trust lands, even if under the rubric of "public purpose"--such as economic growth or local development. As stated in Priewe v. Wisconsin State Land & Imp. Co., 103 Wis. 537, 549-50, 79 N.W. 780 (1899):

> The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose.

The Legislature, thus, may grant lakebed to municipalities, but these grants are revocable and must be conditioned on use of the lakebed in ways that further public trust purposes. For example, the Legislature frequently deeds submerged lands to municipalities, but the deed is conditioned on the municipality's maintenance of the land for park or recreational uses.

Third, although the public trust was originally conceived to protect public rights in navigation, what constitutes a "public trust purpose" has expanded since statehood to include public uses beyond navigation: recreational water uses, pleasure boating, swimming, and the enjoyment of scenic beauty, to name a few. But "public trust purpose" cannot be simplistically equated with the "public interest," which is much broader in scope. For example, in 1971 the City of Kenosha sought to amend its lakebed grant to delete the restriction "for public park purposes" and substitute any purpose, as long as it was "in the public interest." At that time, my predecessor advised the Wisconsin Senate that the public trust purposes must prevail, area that a mere "public interest" requirement in the legislation would not suffice: "Because the use and enjoyment of submerged lands at Lake Michigan's shoreline are involved, any determination of public interest, whether it be by the legislature or delegated body, is subject to limitations imposed by the public trust doctrine." 61 Op. Att'y Gen. 131, 132 (1972) (emphasis added). This makes sense, because almost any permanent invasion of public trust waters could be justified by a short-term public interest. The Wisconsin Supreme Court has made it clear that the state's navigable waters must be preserved for public trust purposes.

Keeping these principles in mind, I will tie them to Racine's proposal in a way that I hope will guide you and other decisionmakers in determining whether, as Racine's proposal develops, it will meet constitutional requirements.

Because the Legislature cannot divest itself of its public trust responsibilities and may only allow a limited delegation of those responsibilities, the issue of who retains control of public trust lands becomes extremely important. Several Wisconsin Supreme Court cases have examined the validity of delegation of public trust authority to local governments and administrative agencies (usually DNR);[4] I am aware of no case that allows a municipality to completely relinquish public control of lakebed or navigable waters to private individuals or corporations. On the contrary, in State v. Public Service Comm., 275 Wis. 112, 81 N.W.2d 71 (1957) , the Wisconsin Supreme Court outlined the factors it considered in evaluating Madison's request to build a civic center on the filled lakebed of Lake Monona, the first of which was: "1. Public bodies will control the use of the area." 275 Wis. at 118. Public control is not the same as providing public access to restaurants, stores, shopping areas or walkways incident to a marina, nor is it consistent with private ownership and control of boat slip facilities.[5]

Of equal concern to the public control issue is whether the proposed development will further public trust purposes. Again, restaurants, stores and other commercial development may innure to the public interest in general because they provide economic growth, but when they are built on lakebed, public trust restrictions prevail. The purposes of these commercial enterprises are unrelated to public trust uses; they are primarily economic (even though one may incidentally enjoy the scenic beauty of Lake Michigan while dining), and they fall outside of any of the purposes traditionally recognized by the public trust doctrine. Stated another way, the supreme court in Public Service Comm., 275 Wis. at 118, required that "'[n]o one of the public uses of the lake as a lake will be destroyed or greatly impaired. Lake includes lakebed even filled-in lakebed; non-public trust uses of lakebed impair the proper use of the lakebed consistent with public trust doctrine.

In conclusion, since the Legislature is the trustee of the state's navigable waters and underlying lakebeds,

legislation is needed to accomplish Racine's lakebed development proposal, and the legislation must be in accord with the public trust doctrine principles outlined in Wisconsin law. In State v. Village of Lake Delton, 93 Wis. 2d 78, 93, 286 N.W.2d 622 (Ct. App. 1979) , the court cautioned that "courts are not bound by declarations of public purposes underlying legislation which affects navigable waters." Indeed, the public trust doctrine has evolved through judicial construction, and courts have the ongoing duty to "limit or rescind actions taken by the state or the state agencies in violation of the trust." State v. Deetz, 66 Wis. 2d 1, 11, 224 N.W.2d 407 (1974). Thus, the courts as well as the Legislature play an important role in preserving the constitutional public trust doctrine thereby insuring that navigable waters will remain "forever free" to all Wisconsin citizens.

Sincerely yours,

Bronson C. La Follette
Attorney General

[1]Milwaukee v. State, 193 Wis. 423, 449t 214 N.W. 820 (1927).

[2]Muench v. Public Service Comm., 261 Wis. 492, 515-1, 53 N.W.2d 514,

[3]Priewe v. Wisconsin State Land and Improvement Co., 93 Wis. 534, 550-51, 67 N.W. 938 (1896).

[4]Menzer v. Elkhart Lake, 51 Wis. 2d 7 0, 186 N.W.2d 290 (1971); Ashwaubenon v. Public Service Comm., 22 Wis. 2d 38, 125 N.W.2d 647 (1963).

[5]Section 30.38, Stats., provides for the leasing of a municipality's harbor lands and facilities, but the municipality must retain ultimate control to insure the day-to-day operation of the harbor. See sec. 30.38(6) and (8)(c), Stats.

BCL/sld

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny, Secretary
BOX 7921
MADISON, WISCONSIN 53707

June 8, 1983 File No. 8300

Honorable Jeffrey Neubauer
State Assembly
108 North
CAPITOL

Re: Assembly Bill 452 - Lake Bed Grant to the City of Kenosha

Dear Representative Neubauer:

This is in response to your request of June 7, 1983, for an opinion concerning the constitutionality of the proposed budget amendment (similar to Assembly Bill 452) to convey lake bed to the City of Kenosha. I have reviewed the proposed legislation and have conferred with the Attorney General's office concerning this matter. The Attorney General's office is in agreement with the opinion contained herein.

The proposed legislation contains provisions for the use of lake bed for the purposes of developing:

(1) "a public marina and promenade";

(2) "senior citizen subsidized rental housing" and associated parking facilities; and

(3) "housing, commercial or office development including, without limitation, hotels, convention centers and related facilities."

It is my opinion that only the first of the above described classes of contemplated development may be permissible under the public trust doctrine of Wisconsin water law. It Is clear that the public trust doctrine as derived from the Wisconsin Constitution would preclude the development of housing and commercial or office development contemplated under (2) and (3), above.

A very brief synopsis of the Wisconsin public trust doctrine may assist in your review of our conclusions. The Wisconsin Constitution, Article IX, Section 2, provides, in part, that all rivers and lakes in the state "shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor." Out of this provision has grown the concept that all navigable waters and the beds of those waters are "held in trust" by the State of Wisconsin for all citizens. See Muench v. Public Service Commission, (1952) 261 Wis. 492, .53 N.W. 2d 514, for a discussion of the trust doctrine.

Over the years, the Wisconsin Supreme Court has broadened the scope of public rights protected by the trust to include public fishing, recreational boating, hunting. the enjoyment of scenic beauty and other public uses of water besides navigation. Muench; State v. Public Service Comm., 275 Wis. 112, 81 N.W. 2d 71 (1957). What has remained constant, however, is the cardinal rule that the trust is to be administered "so as to preserve to the people forever the enjoyment of the water of such lakes, ponds and rivers…. " Illinois Steel v. Bilot, 109 Wis. 418, 84 N.W. 855 (1901).

It has further been held by the Court that the Legislature may authorize limited intrusions into this public trust when public bodies will control use of the area, the area will be devoted to public purposes and open to the public, and none of the public uses of the lake as a lake will be destroyed or greatly Impaired. See State v. Public Service Commission, (1957) 275 Wis. 112, 81 N.W. 2d 71. It has also been held that the state has to right to make a grant for private purposes or where a private person or entity will benefit from such grant. See Priewe v. Wisconsin State Land and Improvement Co., (1896) 103 Wis. 537, 79 N.W. 780.

It is my opinion that the proposed development of "subsidized rental housing" and "housing, commercial or office developments" including "hotels and convention centers" clearly does not meet the public trust criteria established by the Court.

The drafters of this legislative proposal have apparently attempted to meet the constitutional standards by providing that the project will "allow public control over the majority of lands" and arguing that these types of housing and commercial developments are necessary to finance the public marina and promenade development. The use of the lake bed, as well as who controls it, are the primary factors in determining whether or not a proposed grant is consistent with the trust. The proposed legislation is deficient in meeting either the "public use" or "public control" standard. Furthermore, an activity which is otherwise proscribed by the Constitution, i.e., building housing or commercial developments on public lake bed, cannot be permitted under the theory that the funds generated by such proscribed activity will ultimately be put to a "public purpose." Such an interpretation would render the standards established by the Wisconsin Supreme Court meaningless since virtually any development adding to the local tax base could be claimed to support a constitutionally permissible, publicly financed use.

The Court, in reviewing a past attempt by the Legislature to grant lake bed for a private use, held that the Legislature cannot give away or lease what it does not own, stating:

[T]he state is powerless to divest itself of its trusteeship to the submerged lands under navigable waters ... the legislature has no more authority to emancipate itself from the obligation resting upon it… than it has to donate the school fund or the state capitol to a private purpose." Priewe v. Wisconsin State Land and Imp. Co., 103 Wis. 537, 548-49, 79 N.W. 780 (1899). (Emphasis added)

In summary, the proposed legislation would not be constitutional insofar as it conveys submerged lands for purposes unrelated to the exercise of public rights in navigable waters, i.e., for development of housing, office or commercial developments. Conversely, those portions of the bill which relate to the use of submerged lands for public marina and park facilities would, with proper limitations, meet the constitutional public trust requirements.

If you have any further questions concerning this proposed legislation, please call me at 266-3695.

Sincerely,
BUREAU OF LEGAL SERVICES

James A. Kurtz
Director

cc: Rep. Thomas Loftus
Rep. Joseph Andrea
C. D. Besadny

Jeff Neubauer
State Representative

June 6, 1983

Mr. Carroll Besadny, Secretary
Dept. of Natural Resources
101 S. Webster
Madison, WI

Dear Secretary Besadny:

I understand that there may be a proposed agent to the budget that is similar to A.B. 452, relating to new uses for a lakebed grant ceded to Kenosha by the state. These new uses include private use of the ceded area. I am concerned that these uses may violate provisions of the state constitution. Please ask your legal staff to provide me with an analysis of this issue.

Sincerely,

JEFFREY A. NEUBAUER
JAN/i
cc: Rep. Andrea

State of Wisconsin / DEPARTMENT OF NATURAL RESOURCES

June 1, 1983 File No. 8300

Honorable Jeffrey Neubauer
State Assembly
State Capitol
Madison, WI 53702

Re: Marina Development - Sam Meyers Park Racine

Dear Representative Neubauer:

You have asked Michael Cain of my staff to review the materials you submitted concerning legislation relating to the proposed marina development at Sam Meyers Park in the City of Racine. It is somewhat difficult to determine, from the letters you submitted, precisely what is proposed in this development. There is, however, sufficient information to enable me to confirm that portions of the proposal would be inconsistent with the Wisconsin Constitution.

A very brief synopsis of the Wisconsin public trust doctrine may assist in your review of our conclusions. The Wisconsin Constitution, Article IX, Section 1, provides, in part, that all rivers and lakes in the state "shall be common highways and forever free, as well to the inhabitants of the state as to citizens of the United States, without any tax, impost or duty therefor." Out of this provision has grown the concept that all navigable waters are "held in trust" by the state for the public. See Muench v. Public Service Commission, (1952) 261 Wis. 492, 53 N.W. 2d 514, for a discussion of the trust doctrine.

It has further been held that the Legislature may authorize limited intrusions into this public trust area where public bodies will control use of the area, the area will be devoted to public purposes, and none of the public uses of the lake as a lake will be destroyed or greatly impaired. See State v. Public Service Commission, (1957) 275 Wis. 112, 81 N.W. 2d 71. It has also been held that the state has no right to make a grant for private purposes or where a private person or entity will benefit from such grant. See Priewe v. Wisconsin State Land and Improvement Co., (1896) 103 Wis. 537, 79 N.W. 780.

In light of the above, the portions of the proposal which I believe would be constitutionally proscribed are:

(1) The proposed construction of a multipurpose building which will "house a first-class restaurant, a separate lunch room type restaurant, and a ship's supply store."

The restaurants, especially the "first class restaurant", are not necessary support facilities for a public marina and would not meet the public purpose test outlined above. I believe that the "ship's supply store" may be acceptable if its focus is to serve the marina facility rather than being a commercial establishment intended to serve a larger geographic area.

(2) The proposal to lift the "public use restrictions" on the lake bed areas and to, apparently, "grant to Mr. Smolenski the rights in certain submerged lands."

The Legislature has the authority to make a grant of lake bed, which is held in trust by the State of Wisconsin for the people of the State, only so long as the area will be devoted to public purposes and open to the public.

Thus, the public use restrictions must remain intact to have a constitutionally valid grant of the lake bed.

Furthermore, it is clear under Wisconsin law that lake bed cannot be granted to an individual for possible personal gain but, rather, must be under the control of public bodies. This would not preclude a lease or other operating arrangement between the city and Mr. Smolenski, but it would preclude conveyance of title to a private party such as Mr. Smolenski.

I hope this response is useful. The analysis contained herein is necessarily cursory and I would suggest that further discussions might be useful when a more well defined proposal is available.

If you have any questions, please call Michael Cain at 266-2177.

Sincerely,
BUREAU OF LEGAL SERVICES

James A. Kurtz
Director

cc: George Meyer ADM/5
Kris Visser ADM/5
Bob Roden - WRZ/5
Southeast District

CORRESPONDENCE/MEMORANDUM **STATE OF WISCONSIN**

DATE: December 6, 1988 IN REPLY REFER TO: 3550

TO: District Directors (WMC)
PMMS Response
Insertion: Ch. 60 of the Water Regulation Handbook

FROM: Scott Hausmann, WZ/6

Distribution: WRZ Program Staff

SUBJECT: DNR Authority to Grant or Deny Section 401 Water Quality Certification Behind Bulkhead Lines and In Lakebed Grant and Lease Areas - Standing to Grant or Deny Retained

We have been asked whether the Department retains authority to grant or deny s. 401 Water Quality Certification in three areas:

1. Behind bulkhead lines (s. 30.11, Stats.)

2. In lakebed grants to municipalities on Lake Michigan (s. 30.05, Stats.)

3. In lake or streambed leases (s. 24.39, Stats.)

In all three cases either the Department or the state legislature has permit or licensing authority which regulates the filling of these areas. For bulkhead lines and leases the water quality component of a general public interest test must be satisfied for filling to be authorized [ss. 24.39(4)(c) and 30.11(2) stats.]. In the case of lakebed grants, limitations on the type of fill material are generally not explicit. However, there is a presumption that materials which constitute solid waste may not be deposited in state waters. Accordingly, we should grant or deny water quality certification for filling based on consistency with bulkhead line permit conditions, lease terms or legislative grant limitations related to water quality an the solid waste provisions of ch. 144 stats. Certification may only be denied based on permit or lease conditions or legislative grant terms related to water quality (not those related to general navigation, use limitations or other criteria not directly related to water quality). We must not waive water quality certification since the state meets the tests for Section 401 standing, i.e. 1) regulatory jurisdiction to limit the filling of these areas and 2) water quality standards that apply.

Related Guidance: None

Requested By: Vic Pappas

Drafted By: Michael Dresen

Reviewed By: Ken Johnson - WZ/6
Mike Cain - LC/5

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